

1 GARY E. WEISS (SBN 122962)
 gweiss@orrick.com
 2 I. NEEL CHATTERJEE (SBN 173985)
 nchatterjee@orrick.com
 3 JULIO C. AVALOS (SBN 255350)
 javalos@orrick.com
 4 ORRICK, HERRINGTON & SUTCLIFFE LLP
 1000 Marsh Road
 5 Menlo Park, CA 94025
 Telephone: +1-650-614-7400
 6 Facsimile: +1-650-614-7401

STEPHEN S. SMITH (SBN 166539)
 ssmith@greenbergglusker.com
 WILLIAM M. WALKER (SBN 145559)
 wwalker@greenbergglusker.com
 GREENBERG GLUSKER FIELDS
 CLAMAN & MACHTINGER LLP
 1900 Avenue of the Stars, 21st Floor
 Los Angeles, California 90067-4590
 Telephone: +1-310-553-3610
 Fax: +1-310-553-0687

Attorneys For Defendants STUDIVZ, LTD.,
 HOLTZBRINCK NETWORKS GMBH,
 HOLTZBRINCK VENTURES GMBH

9 ANNETTE L. HURST (SBN 148738)
 ahurst@orrick.com
 10 WARRINGTON S. PARKER (SBN 148003)
 wparker@orrick.com
 11 ORRICK, HERRINGTON & SUTCLIFFE LLP
 The Orrick Building
 12 405 Howard Street
 San Francisco, CA 94105-2669
 13 Telephone: +1-415-773-5700
 Facsimile: +1-415-773-5759

Attorneys for Plaintiff
 FACEBOOK, INC.

16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION

20 FACEBOOK, INC.,

21 Plaintiff,

22 v.

23 STUDIVZ LTD., HOLTZBRINCK
 24 NETWORKS GmbH, HOLTZBRINCK
 25 VENTURES GmbH, and DOES 1-25,

26 Defendant.

Case No. 5:08-cv-03468 JF

**JOINT CASE MANAGEMENT
 STATEMENT**

1 This Court has set the Initial Case Management Conference for November 7, 2008.
2 Pursuant to an Order dated July 18, 2008, Federal Rule of Civil Procedure 26(f), and Local Rule
3 16-9, the parties hereby submit the following joint case management statement:

4 **I. JURISDICTION AND SERVICE:**

5 **A. Subject Matter Jurisdiction:**

6 The parties agree that this Court has subject matter jurisdiction over Plaintiff's
7 claims under 28 U.S.C. §§ 1331, 1367. Plaintiff Facebook, Inc. ("Plaintiff" or "Facebook")
8 contends that venue is proper under 28 U.S.C. §§ 1391(b), 1391(c). Defendants StudiVZ, Ltd.
9 ("StudiVZ"), Holtbrinck Networks GmbH, and Holtzbrinck Ventures GmbH (collectively
10 "Defendants") contend that venue is improper and have filed motions to dismiss under the
11 doctrine of *forum non conveniens*. Defendants contend that Germany is the proper venue.
12 Defendants have waived service of the Summons. *See* Dkt. No. 8.

13 **B. Personal Jurisdiction Issues:**

14 Plaintiff contends that this Court has personal jurisdiction over Defendants.
15 Plaintiffs believe that Defendants have engaged in activity directed at California and have
16 purposefully availed themselves of the jurisdiction of this State. Plaintiff also believes it can
17 aggregate the nationwide contacts of each Defendant to establish personal jurisdiction of that
18 Defendant. Defendants disagree and contend that the Court lacks personal jurisdiction over them.
19 Defendants have filed motions to dismiss for lack of personal jurisdiction. Plaintiff dismissed
20 Verlagsgruppe Georg von Holtzbrinck GmbH ("VGH") after VGH filed a motion to dismiss for
21 lack of personal jurisdiction.

22 **II. FACTS**

23 Facebook claims that Facebook operates one of the most trafficked and successful
24 social networking website in the world. Facebook further alleges that, originally founded by Mark
25 Zuckerberg in 2004 while he was a student at Harvard University, Facebook has since become the
26 social networking site of choice among virtually every demographic of internet user over the age of
27 13. Facebook further contends that Facebook has expended significant resources and gone to great
28 effort to create a service that excels in creativity, functionality, originality, and that provides users

1 with an optimal experience.

2 Plaintiff contends that Defendants are running a knockoff of Facebook's website.
3 StudiVZ.net launched a year and a half after the debut of Facebook's website. Plaintiff believes
4 StudiVZ capitalized on the success of Facebook, by trespassing on Facebook's systems and
5 copying its look, feel, features and services. StudiVZ has expanded from its native Germany to
6 many other nations throughout Europe. Plaintiff contends that a great deal of StudiVZ's success
7 is due to its copying and misuse of Facebook's intellectual property. Plaintiff further contends
8 that StudiVZ does not and cannot provide the same level of quality of user experience. Facebook
9 does not want its goodwill to suffer as a result of any confusion. Facebook, therefore, seeks to
10 end StudiVZ's activity.

11 Defendants contend that they are not subject to personal jurisdiction in this Court.
12 In addition, they contend that this case should be dismissed for *forum non conveniens*.
13 Defendants further contend that they should not be forced into litigating the facts of this dispute
14 unless and until the motions to dismiss are resolved against it. Accordingly, Defendants will not
15 at this time address the facts of the dispute, other than to say that Defendants deny Facebook's
16 claims.

17 **III. LEGAL ISSUES**

- 18 1. Did Defendants violate the Computer Fraud & Abuse Act, § 18 U.S.C. §
19 1030?
- 20 2. Did Defendants violate California Penal Code § 502(c)?
- 21 3. Are Defendants liable for trade dress infringement for copying the look and
22 feel of Facebook under 15 U.S.C. § 1125?
- 23 4. Did Defendants breach Facebook's Terms of Use?
- 24 5. Did Defendants breach the implied covenant of good faith and fair dealing
25 implied in all contracts?
- 26 6. What damages, if any, are available to Plaintiff in the event a claim is
27 successful?
- 28 7. What remedies, if any, are available to Plaintiff in the event a claim is
 successful?
8. Is venue proper in the Northern District of California?

1 9. Should this case be transferred to Germany under the doctrine of forum
2 non-conveniens?

3 10. Does this Court have personal jurisdiction over Defendants?

4 **IV. MOTIONS**

5 **A. Pending Motions**

6 On October 22, 2008, Defendants filed motions to dismiss for lack of personal
7 jurisdiction or, in the alternative, to dismiss on the grounds of *forum non conveniens*. The
8 motions are scheduled for hearing on Friday, February 13, 2009.

9 **B. Anticipated Motions**

10 Defendants intend to file a motion for protective order seeking (1) to stay all merit-
11 based discovery until the motions to dismiss are resolved and (2) to prevent Facebook from using
12 in the German lawsuit pending between StudiVZ and Facebook (the “German Action”) discovery
13 obtained in this action. Plaintiff has indicated an intention to file a motion to compel merit-based
14 discovery. It is likely that the parties will have disputes concerning the scope of any personal
15 jurisdiction discovery. Both parties reserve the right to file additional dispositive motions, such
16 as motions for summary judgment and motions to dismiss under Federal Rule of Civil Procedure
17 12(b)(6).

18 **V. AMENDED PLEADINGS**

19 Both parties reserve the right to amend the pleadings. Plaintiff proposes March 31,
20 2009 as the last date for the parties to amend its pleadings. Defendants dispute Plaintiff’s
21 proposed dates as being premature given the pendency of the motions to dismiss.

22 **VI. EVIDENCE PRESERVATION**

23 Both parties have taken steps to preserve all evidence relevant to the issues
24 reasonably evident in this action, and to interdict any automatic document destruction program,
25 such as the automatic erasures of e-mails, voice mails, and other electronically-recorded material,
26 including preservation of all iterations of website source code, dynamic web pages, screen shots,
27 html code, other web documents, inaccessible storage media, disaster recovery media and other
28 storage methods not used in the ordinary course of business. Specifically, Plaintiff has sent out a

1 litigation hold to its employees on July 18, 2008. Plaintiff has also taken steps to preserve and
2 back up its servers. Plaintiff has also preserved copies of pertinent source code, html code and
3 dynamic web pages relevant to this dispute.

4 Defendants have also sent out a litigation hold to its employees on or about July
5 23, 2008. Defendants have also taken steps to preserve and back up its servers. Defendants have
6 also preserved copies of pertinent source code, html code and dynamic web pages relevant to this
7 dispute. In addition, both parties agree to the preservation and production of electronically stored
8 information as outlined in the Joint Discovery Plan submitted herewith. Defendants reserve their
9 rights to seek reasonable limits on electronic discovery.

10 **VII. INITIAL DISCLOSURES**

11 This Court has set the deadline for the parties to exchange initial disclosures by
12 October 31, 2008. Plaintiff intends to file timely initial disclosures by the deadline set by this
13 Court. Defendants believe that the initial disclosure deadline should be extended until a
14 reasonable period of time after the resolution of their pending motions to dismiss. Defendants
15 intend to file a motion for protective order staying all discovery that is un-related to the material
16 issues raised in the motions to dismiss, and believe that producing initial disclosures before the
17 motions to dismiss are resolved would defeat the purpose of those motions.

18 **VIII. DISCOVERY**

19 Plaintiff hereby files a Discovery Plan submitted herewith. Defendants believe
20 any discovery plan is premature until the issues of personal jurisdiction and forum are resolved.
21 Defendants have agreed to meet and confer with Plaintiff concerning appropriate discovery
22 directed to any material issues in the motions to dismiss that are in dispute. An initial meet and
23 confer reveals that there is likely a dispute between the parties concerning the scope of discovery
24 relating to the issue of personal jurisdiction. This may require resolution by the Court. Plaintiff
25 contends that merit-based discovery is warranted at this time. Defendants oppose merit-based
26 discovery at least until the issues of personal jurisdiction and *forum non conveniens* are resolved.

27 In addition, Defendants believe that there are potential conflicts between U.S.
28 discovery procedures and mandatory applicable laws of, *inter alia*, Germany and the European

1 Union that may impact the scope of discovery. Defendants reserve their rights with respect to
2 those laws.

3 **IX. CLASS ACTIONS**

4 This case is not a class action.

5 **X. RELATED CASES**

6 StudiVZ filed the German Action against Facebook on the same day that this
7 action was filed.

8 The German Action is pending in the Stuttgart Regional Court in Stuttgart,
9 Germany and scheduled for trial in December of this year. In the German Action, StudiVZ seeks
10 a declaratory judgment that StudiVZ does not infringe any of Facebook's rights, including,
11 without limitation, that StudiVZ does not violate any of Facebook's intellectual property rights,
12 that StudiVZ's websites do not constitute unfair imitation of Facebook's website, and that
13 StudiVZ has not infringed the terms and conditions for use of Facebook's website.

14 Plaintiff contends that the German Action does not seek to address StudiVZ's
15 alleged liabilities in the U.S. or any of the substantive claims asserted by Facebook in this Court.
16 Defendants disagree and contend that the German Action will resolve all disputes between the
17 parties.

18 **XI. RELIEF**

19 Plaintiff prays for injunctive relief and monetary damages to be proven at trial.
20 The bases for Plaintiff's monetary damages include statutory damages, liquidated damages and
21 compensatory damages under the Computer Fraud & Abuse Act, 18 U.S.C. § 1030(g), California
22 Penal Code § 502(e)(1), breach of contract, and breach of the covenant of good faith and fair
23 dealing. Plaintiff further requests disgorgement of any profits earned by Defendants as a result of
24 its unlawful conduct and obtaining a head start in the social networking website market. Plaintiff
25 also requests punitive and aggravated damages for Defendants' willful acts of trademark
26 infringement under § 15 U.S.C. § 7706(g)(3)(C) and willful violations under the Computer Fraud
27 & Abuse Act, 18 U.S.C. § 1030(g), and punitive or exemplary damages under California Penal
28 Code §502(e)(4).

1 StudiVZ seeks declaratory relief in the German Action to declare that StudiVZ has
2 not violated any of Facebook's rights.

3 **XII. SETTLEMENT AND ADR**

4 The parties have timely filed the ADR Certification and a Stipulated Proposed
5 Order selecting the ADR process pursuant to Civil L.R. 16-8 and ADR L.R. 3-5. The parties
6 have stipulated to a private mediation to be tentatively taken by October 31, 2009.¹ The parties
7 believe that this case will be appropriate for settlement discussions once fact and expert discovery
8 has taken place.

9 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

10 The parties do not consent to a magistrate judge for all purposes, including trial or
11 entry of judgment. The parties consent to a magistrate judge for purposes limited to discovery
12 only.

13 **XIV. OTHER REFERENCES**

14 The parties do not believe this case is suitable for binding arbitration, a special
15 master, or the Judicial Panel on Multidistrict Litigation.

16 **XV. NARROWING OF ISSUES**

17 The parties believe that they lack sufficient information at this early stage to
18 identify issues that can be narrowed by agreement or by motion, other than the pending and
19 anticipated motions described above, but expect that there may be occasion to do so following
20 fact and expert discovery.

21 **XVI. EXPEDITED SCHEDULES**

22 The parties believe they lack sufficient information at this early stage to identify
23 whether this case may be resolved on an expedited basis. Plaintiff proposes that this case be set
24 for trial by November 30, 2009.

25 **XVII. SCHEDULING**

26 Plaintiff proposes the following schedule, subject to appropriate modifications or
27

28 ¹ As noted earlier, Defendants dispute Plaintiff's proposed dates in the Joint Discovery Plan. As such, October 31, 2009 is a tentative deadline.

revisions, by stipulation or as warranted under Federal or local rules, or by court order:

Event	Proposed Deadline
Close of Fact Discovery	May 29, 2009
Last Day to Amend Pleadings	March 31, 2009
Last Day to File Non-Dispositive Motions	July 31, 2009
Expert Disclosures by Both Parties	August 7, 2009
Disclosure of Rebuttal Experts	September 7, 2009
Close of Expert Discovery	October 7, 2009
Last Day to File Dispositive Motions	November 6, 2009
Pretrial Disclosures by Both Parties	October 30, 2009
Pretrial Conference	November 23, 2009
Trial	November 30, 2009

Defendants believe that the schedule proposed by Plaintiff is premature given the pendency of case dispositive motions on the grounds of lack of personal jurisdiction and *forum non conveniens*. Even if the Court were to find that all of the Defendants are subject to the Court's jurisdiction, and that the Court should not dismiss the action based upon *forum non conveniens* given the pending and first-served German Action, there are other, Rule 12(b)(6) motions that Defendants would bring to narrow the scope of the causes of action at issue in this litigation.

Accordingly, Defendants believe that the dates should be set only after the Court decides Defendants' case dispositive motions, which will either eliminate or narrow the parties and causes of action at issue.

XVIII. TRIAL

Plaintiff requests a jury trial. Plaintiff believes that the anticipated length of trial will be 7-10 days. Defendants believe that, given the complexity of the case, the need to translate live testimony and having to use multiple versions of the same exhibits based upon the need for translations, the trial would take at least 21 days.

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1 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES AND PERSONS**

2 Pursuant to Civil L.R. 3-16, the parties certify that as of this date, other than the
3 named parties, there are no further interested entities or persons in this action that would affect
4 the outcome of this litigation.

5 **XX. OTHER MATTERS**

6 The parties believe that they lack sufficient information at this early stage to
7 identify other matters that may facilitate the just, speedy and inexpensive disposition of this
8 matter, other than the pending and anticipated motions described above, but expect that there may
9 be occasion to do so following fact and expert discovery.

10
11 Dated: October 31, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

12
13 /s/ Warrington S. Parker III /s/

14 Warrington S. Parker III
15 Attorneys for Plaintiff
16 FACEBOOK, INC.

17
18 Dated: October 31, 2008

GREENBERG GLUSKER FIELDS CLAMAN &
MACHTINGER, LLP

19 /s/ Stephen S. Smith /s/

20 Stephen S. Smith
21 Attorneys for Defendants
22 STUDIVZ, LTD., HOLTZBRINCK NETWORKS
23 GMBH AND HOLTZBRINCK VENTURES
24 GMBH

25 I, Warrington S. Parker III, am the ECF User whose identification and password
26 are being used to file this **JOINT CASE MANAGEMENT STATEMENT**. Pursuant to
27 General Order 45.X.B., I hereby attest that Stephen S. Smith, counsel for **Defendants**, has
28 concurred in this filing.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that this document(s) filed through the ECF system will be sent
3 electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)
4 and paper copies will be sent to those indicated as non registered participants on October 31,
2008.

5 Dated: October 31, 2008 .

Respectfully submitted,

6 /s/ Warrington S. Parker III/s/
7 WARRINGTON S. PARKER III